INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY of AGRICULTURE,
And The UNITED STATES OF AMERICA
PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION,
COMPANY, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

RESPONDENT'S CORRECTED STATEMENT

The statement given on behalf of the Secretary will be accepted by the respondent, with the exception of the last three paragraphs thereof. In those paragraphs, the petitioner departs from facts and presents an argument, or rather attempts to invade the minds

of the learned judges below, as to the reason for their holding. The respondent feels that the only fair way to present to this court the lower court's view is a verbatim recital of the language employed, rather than to paraphrase the language or to quote from it in an order different than appears in the opinion itself. The language used by the court of appeals is as follows:

> "The Department refers us to four decisions of the Secretary in which suspensions of registration are imposed for short-weighing consigned cattle. In re *Townsend*, 27 A.D. 68 (1968); In re *Farmers Commission Co. Inc.*, 24 A.D. 1491 (1965); In re *Wayne County Livestock Exchange, Inc.*, 23 A.D. 185 (1964) and In re *Milton Silver*, 21 A.D. 1438 (1962). In all four it was clearly established that the complained of conduct was intentional—in each the respondent had deliberately 'back-balanced' or set the scale back behind zero so that it would shortweigh livestock. And it is apparent that the dominant purpose of the suspensions imposed was to punish the various respondents for their intentional and flagrant conduct.
>
> Here to say the least, the evidence indicates that Glover acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness,' but its conduct was not shown to be deliberate or flagrant. Although we fully appreciate the seriousness of the offenses committed by Glover, a suspension would not 'achieve * * * uniformity of sanctions for similar violations' (see in re *Milton Silver*, supra, at 1452) and it

appears to us to be 'unwarranted and without justification in fact.' *American Power & Light Co.*, supra, at 112-113. The cease-and-desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate. Under these circumstances a suspension would be unconscionable. We reverse as to the suspension of Glover as a registrant under the Act.

The Secretary's order is affirmed as modified." (Pet. App. A, 24-25)

SUMMARY OF ARGUMENT

While the respondent has never abandoned, except for the record, the constitutionality of a proceeding whereby its right to a judicial hearing on the merits is denied, it concedes, as it has conceded, that any statutorily authorized order of the Secretary is subject only to a limited scope of judicial review. The scope of that review has been considered by this court and the circuit courts on many occasions, and out of those cases have come many scholarly definitions of the rights enjoyed by the respondent and others similarly situated to seek relief from an administrative order.

After this matter ended its long tortuous journey through the maze of administrative procedure, the respondent appealed, and in the briefs prepared and filed here and in the circuit court, many cases have been cited as to the scope of judicial review involved herein and in many instances, the same cases have been cited by both sides. Whatever the particular language used

by this court or the circuit courts, no court has ever felt itself powerless to look over the shoulder of the executive branch of our federal government to ascertain whether or not such an agency had violated the constitutional or statutory rights of a citizen of this nation. This court stated in *American Power Co. v. Securities and Exchange Commission*, 329 U. S. 90 not only that "the relation of remedy to policy is peculiarly a matter for administrative competence * * *" as is quoted by the petitioners at Page 7 in their summary of argument, but also that the remedy chosen will not stand if it is "unwarranted in law or is without justification in fact." The petitioners and the respondent's citations from that case are taken from Pages 112-113.

The government seeks a reversal of the Eighth Circuit's modification of the sanction invoked for the following reasons:

(1) The Act authorizes suspension by the Secretary for violations thereof.

(2) The Secretary had previously ascertained that suspensions were necessary where the violations were merely negligent, as opposed to intentional, deliberate, and/or flagrant.

(3) Even if the Secretary had established a standard of conduct that was decisive on the question of invoking a suspension or not, a reviewing court had no authority to even consider the established standard in ascertaining whether or not a suspension should be invoked in a particular case.

As to the first point, respondent readily concedes that a suspension is authorized by the Act.

On the contrary, however, the respondent has consistently maintained that the Department of Agriculture decided many years ago that suspensions were only necessary where the weight violations were deliberate and intentional, as opposed to merely accidental or negligent. This is supported by the fact that the Secretary never ordered a suspension before or after the one in issue, unless the weighing violation was found to have been conducted deliberately and/or intentionally by some overt act of the market agency, usually back-balancing the scales.

As to the third point, having established the standard by which suspensions are invoked or not, the Secretary should not be allowed to arbitrarily and discriminatorily administer the Act by suspending the Glover Livestock Commission Company, Inc., where even its own departmental investigators, attorneys, and judges found no intentional, deliberate, or flagrant violations by the respondent as to its weighing activities. In all cases decided before and after the one in issue, no suspension had been ordered for accidental or negligent weight violations, nor did the Secretary give any reason in this case that a suspension was necessary, as to the specific market agency involved, or that it would be necessary, as to future violations of a similar nature by others, to insure compliance with the Act.

The court appeals below, while recognizing the limited scope of judicial review to which the respondent was entitled, and while affirming the Secretary on

its fact finding that there had been a weighing violation, found that the Secretary had established a standard of conduct to be used in ascertaining whether or not a suspension should be ordered and modified so much of the order in this particular case as included a suspension finding that such, under the circumstances herein involved, would be "unconscionable".

The ruling of the lower court below poses no threat to the proper administration of the Act in question or the administration of any other regulatory agency, since it requires those agencies only to administer their congressionally mandated authority in a fair and nondiscriminatory manner.

ARGUMENT

THE COURT OF APPEALS WAS CONSTITUTIONALLY AND STATUTORILY AUTHORIZED TO MODIFY THE SECRETARY'S ORDER BY SETTING ASIDE THE SUSPENSION INVOKED AGAINST THE RESPONDENT.

A. THE CONSTITUTIONAL REQUIREMENTS OF CHECKS AND BALANCES, AS BETWEEN BRANCHES OF GOVERNMENT, NOT ONLY AUTHORIZE BUT DEMAND THAT A REVIEWING COURT SET ASIDE ANY ADMINISTRATIVE ORDER FOUND BY THAT COURT TO BE "UNCONSCIONABLE".

The petitioners argue that the court below exceeded its power of judicial review as to the suspension order because the review of such an order is limited to determining whether the agency made an *allowable* choice of remedy. — Once again, the same line

of cases are cited, all of which contain varying definitions of the scope of proper judicial review of administrative sanctions, none of which, under any conceivable interpretation, allow a sanction to stand that was found to be "unconscionable".

There are no reported cases where this court has considered such an insignificant matter as a twenty-day suspension of a livestock market agency, which suspension, according to a magnanimous United States Department of Agriculture, would involve only three sale days. All other persons, firms or corporations who have pled their cause before this final tribunal, as to an order of an agency of the United States government, have come here on matters of great financial import. The respondent here is neither a public utility, a national radio or television broadcasting system nor does it engage in multimillion dollar commodity futures transactions. It is here simply because it received partial vindication of its integrity by the ruling of the Eighth Circuit Court of Appeals. Its stockholders and employees denied, and deny to this day, any wrongdoing.

On May 12, 1969, a complaint was filed against it by the Secretary of Agriculture (App. 2, 3), and on May 20, 1969, an attorney for the Secretary posted a letter advising the petitioners that execution of a document attached to that letter would result in a recommendation by the Office of the General Counsel of the United States Department of Agriculture to the Judicial Officer of the Department of Agriculture that a final order be issued as outlined in said document. The petitioners were given a chance to follow what is

known of and referred to in that letter as a "Consent Order Procedure". (Res. App. B, C)

The "Consent Order Procedure" would have resulted in a final order on behalf of the Secretary identical with the one from which the petitioners sought judicial review of the Eighth Circuit Court of Appeals, except that the period of suspension had been reduced by the Judicial Officer of the United States Department of Agriculture from the thirty days recommended by the Hearing Examiner to twenty days.

It is respectfully submitted that neither the constitution nor any applicable statute require approval of administrative actions simply because the agency involved was statutorily empowered to take such action. The court below did not deny the Secretary's authority to suspend the petitioners for twenty days. It merely held that such action would be "unconscionable." This ruling represents no danger to the power of the Secretary of Agriculture; it merely imposes upon him a duty to act in good conscience. Is this a burden on an agency of the United States of America?

Likewise, is a reviewing court and a federal judiciary system powerless to set aside a penalty of an agency over which it has statutory authority to supervise, if it finds that such action is "unreasonable; * * * and not guided or influenced by conscience, unscrupulous." (Webster's UnAbridged Dictionary)

Three cases are cited by the Secretary to sustain his position that the court below is the only court of appeals that has failed to follow the established principals of judicial review in similar situations. In other words, it would put the Eighth Circuit in con-

flict with all other circuits and with this court as to the question in issue. This is clearly an erroneous position, as is evident by a simple reading of the opinion written by Circuit Judge Stephenson in this matter. If the Secretary had given a reason why the sanction was necessary to deter future violations, then he would have been affirmed in all respects. He gave no reason to the court below, and he gives no reason here today. He would hide behind the *expertise* theory that only the Department can determine what sanction is necessary to deter future violations, and that he is the only person who has the informed judgment to make such a decision. The Secretary never found it necessary before to suspend a market agency under the factual situation involved here (as will be hereinafter discussed in greater detail), so there was no basis for his action upon which the court below could justify such action. He came before them with a suspension order that had never been invoked before under the same or similar factual situations and one that was found by the court below to be "unconscionable." What standing does he have to complain because the Eighth Circuit did its duty and reversed the suspension?

The three cases cited by the Petitioners are *G. H. Miller & Co. v. United States*, 260 F.2nd 286, certiorari denied, 359 U. S. 907; *Eastern Produce Co. v. Benson*, 278 F.2nd 606; and *Hyatt v. United States*, 276 F. 2nd 308. Except for the fact that all three cases cite the concededly limited scope of judicial review of administrative actions, they are not in point to the question here. In *Miller*, supra, there was no defense offered to the proof tendered by the Secretary of Agriculture, and there was positive testimony that the

petitioners had cornered the egg market to their profit of some $162,000.00 and how they went about doing it. It is noteworthy also that there was not only a rather scathing disent, but the opinion of the majority reflected that "ordinarily" a court of appeals has no right to change a penalty. The qualification is built into the opinion itself as quoted by the petitioners here at Page 13 of their brief. In *Eastern Produce*, supra, the parties, seeking a review of the Secretary's suspension orders, admitted violations of the Commodities Act, and in *Hyatt*, supra, the suspended registrants had previously admitted violations of the same Act in question by utilization of the "Consent Order Procedure" the year preceding the alleged violation in question.

In none of those cases was a finding that the sanction invoked was "unconscionable" or that the Secretary had deviated from his prior practices as to the same or similar violations. The respondent finds no fault with the rulings in those cases, but they are not persuasive here because of the factual differences just pointed out. It should be noted also that the Tenth Circuit in *Hyatt v. United States*, supra made a specific finding that the penalty "does not appear immoderate." The court took note of the prior violations and the nature of the proven infractions. It would appear that the Tenth Circuit would be in accord with the Eighth Circuit as to the Secretary's actions against the respondent, Glover Livestock Commission Company, Inc., and that the sanction must be "conscionable" (Eighth Circuit) "not immoderate" (Tenth Circuit)

B. THE NAKED AUTHORITY ENJOYED BY THE SECRETARY DOES NOT EXTEND TO EXERCISING THAT AUTHORITY ARBITRARILY NOR WITHOUT RESTRAINT.

1. An administrative order, which is unwarranted because of the lack of factual basis, cannot be justified merely because of the conclusionary language used by that agency in its order.

The petitioners would ask this court to reverse simply because a suspension is authorized by the act in question.

In spite of the fact that the opinion specifically states the suspension was within the Secretary's statutory authority, the petitioners would imply that the Eighth Circuit acted because of a misconception of the applicable law, with the following language from Page 14:

> "Although the court of appeals acknowledged that the Secretary so acted, its opinion seems to suggest that the Secretary lacks authority to suspend merely negligent violaters * * *"

This position just simply cannot be maintained. There is nothing in the opinion to suggest that the learned judges below had any misconception as to the Secretary's authority nor the scope of its review, as set out by statute and defined by previous pronouncements of this court.

Then in a footnote, at Page 14, the petitioners would deny to the respondents their partial vindication by the circuit court upon the theory that there

was ambiguity between the Hearing Examiner's recommended order and the Judicial Officer's final order in the choice of language employed. For whatever reason the Hearing Examiner used the word "intentionally", it is certainly wholly immaterial. He probably used it out of habit, because he was recommending a suspension. However, the Judicial Officer did not find any intentional violation, nor is there one alleged in the complaint filed against Glover nor any facts upon which such a finding could have been based. All that was found and all that could have been found was that the employees of the U. S. Department of Agriculture, on February 25, 1969, weighed twenty-eight drafts of livestock that had previously been weighed by the respondent during its auction sale and found certain weight discrepancies. Of those reweighed, nine weighed more according to the government, ten weighed the same, and nine weighed less. Since livestock are expected to lose weight when denied excess to food and water, the government concluded that, on the day in question, the respondent had not weighed the cattle properly. Testimony was introduced that such reweighing tests had been previously performed by the employees of the United States Department of Agriculture, in all of which there was some variance, some weighed more, some weighed the same, and some weighed less, but there was no proof that the respondent back-balanced the scale so that the livestock would be short-weighed purposely or that it did anything of a deliberate or intentional nature to knowingly under-weigh livestock.[1]

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[1]Packers and Stockyards area Supervisor Kenneth Grizzell, who supervised the investigation, admitted he had no proof of intentional incorrect weighing by Glover. (App. 8)

Therefore, there is absolutely no merit to the position taken by the government, at Page 14, that the Secretary found that the respondent's violations were anything more than negligent and certainly not that there was any sort of a finding of a deliberate, flagrant or intentional violation of the Act.

The petitioner takes the position at the bottom of Page 15 that a cease-and-desist order may not secure future compliance by the market agency and has little effect in encouraging other market agencies to adhere to our standards. The Solicitor General and the Department of Justice may not so feel, but the Secretary of Agriculture certainly did, and after all, he is the one charged with administering the Act by his decisions in previous cases.

No suspension order was found necessary in the following three cases, where the violations were clearly deliberate and intentional. In *Clinton Cattle Co.*, 24 A.D. 7, the market agency received three warnings by the Department that the scales would not weigh accurately, but they continued the use of them until a complaint was filed against them and a cease-and-desist order was the only sanction. *Dale Oswald d/b/a Dale's Sales Barn*, 26 A.D. 1061 (1967) was a case wherein the agency's scales were rejected as being out of tolerance on November 30, 1966; a letter was posted to that effect December 15, 1966, and again on January 9, 1967 that the scales were not accurate and that the continued use thereof would be contrary to the Act and the regulations thereunder. The agency, however, continued to use the scales through May 3, 1967, and after a complaint was filed against him on June 8, 1967, he admitted all of these matters and admitted

that for over a year he had failed to maintain and operate his scales so as to insure accurate livestock weight. No suspension, just a cease-and-desist order. Finally, in *Clarendon Auction Sales, Inc.*, 27 A.D. 222 (1968), the agency operated scales that were admittedly inaccurate in that they greatly exceeded the allowed tolerances and continued this operation for some eight months after the Department had rejected the scales and advised them not to use the same until repaired and approved upon retesting by the Department. Further, the scale had no type registering weigh beam, no dial or mechanical ticket printer or other device to print weights on scale tickets. This corporation issued scale tickets that did not show the name of the weighing agency, the date of the weighing, the name of the buyer, the name of the seller, the number of head, the kind and actual weight of the livestock, nor the name or initial of the weighmaster. They admitted not only these violations but further that they had been notified some three years prior thereto as to scale ticket violations. As if this were not enough, this corporation for over three years after notification that such conduct was in violation of the regulations, failed to follow the Department's requirements for segregationg their funds from those due the seller in a separate bank account. — No suspension, just a cease-and-desist order.

In all these cases, the exact nature of the violation and how it might be corrected was made known to the market agency. Not so with this respondent. All that was alleged or proven against it was that the Department's own employees conducted a check-weighing procedure on certain occasions, and that the

Department's employees found the weights to be different from those found by the respondent's employees.

Not only had the Secretary previously determined that a cease-and-desist order was all that was necessary in the above styled cases, but he has consistently, systematically, and uniformally refused to invoke a suspension unless, as the Eighth Circuit pointed out, the conduct complained of was intentional, and further, in all cases cited by the Secretary in the court below, the market agency had deliberately "back-balanced" or set the scale back beyond zero so that it would short-weigh livestock. The statement made by the Department of Justice, at Page 16 of its brief, that the Secretary had made a determination prior to the final order in this case that suspensions were necessary to deter repeated "negligent" violations of the Act, and the cases cited for its position by references to Pages 20 and 21 of its brief are misleading to the extreme in that all eighteen of them involved an admission of guilt and were conducted under the so called "Consent Order Procedure". No negligent violations were involved in any of those cases; no hearing was held; and no adjudication necessary by the Secretary. Those parties were guilty, admitted their guilt, and plea-bargained with the Department of Agriculture.

These cases will be discussed in greater detail under the heading wherein they are cited by the government, but it is noteworthy in passing that three of those parties entered into a consent order, since Glover was administratively concluded by the Department, and all three involved not only admissions by the market agency but also either a finding that they

"knowingly" short-weighed by back-balancing prior to weighing, weighed when the scales were not in balance, or failed to install and maintain the scales so as to insure accurate weights. None of the suspensions exceeded twenty days in duration.

The Secretary of Agriculture had not made such determinations as are credited to him by the Department of Justice.

2. THE COURT OF APPEALS WAS STATUTORILY AND CONSTITUTIONALLY EMPOWERED TO MODIFY THE SECRETARY'S ORDER ON THE GROUNDS STATED IN ITS OPINION.

a. THE COURT BELOW MERELY RESTATED THE SECRETARY'S ESPOUSED DESIRABILITY OF UNIFORM SANCTIONS FOR SIMILAR VIOLATIONS AND USED THE PRECEDENT ESTABLISHED THEREBY AS ONE OF ITS REASONS FOR MODIFICATION OF THE ORDER IN ISSUE.

The petitioners argue as follows:

> "The court improperly attempted to insure that the sanctions imposed by the Secretary were uniform in all cases."

The Eighth Circuit made no attempt, properly or improperly, to do that which is alleged by the Department of Justice. It was the Secretary, not the Eighth Circuit, that found uniformity of sanctions to be desirable in an opinion written in 1962 and cited by the Secretary in In re *Roy C. Townsend d/b/a Madison Stockyards*, 27 A.D. 68 (1968). This is the usual

citation contained in final orders of the Secretary in a contested case where it is necessary for findings and conclusions to be made under the Act as to improper weighing allegations against a market agency. It is obvious that the case cited therein, In re *Milton Silver*, 21 A.D. 1438 (1962) has established the standard by which the Secretary and his precedessors, since 1962, decide the nature of the sanctions to be imposed. This standard has been scrupulously followed by the Secretary on the question of suspensions in all cases since it was first embraced by the Secretary, *except the one involving the respondent, Glover Livestock Commission Company, Inc.*

The Secretary came before the Eighth Circuit Court of Appeals citing four cases to sustain his position as to the suspension, all of which involved factual situations wherein it was clearly established that the conduct complained upon was deliberate in that the market agency in each case had purposely "back-balanced" or set the scale behind zero so that it would short-weigh livestock. This was his authority for the suspension against this Respondent, and the Secretary was silent as to Glover's repeated allegations of discriminatory action against it and cited no prior ruling of the Department invoking a suspension in the absence of deliberate short-weighing.

Respondent is not unmindful of Footnote 6 at Page 20 of the petitioner's brief, wherein they attempt to explain away In re *Milton Silver*. First they would state that the Hearing Examiner would have ordered a suspension if the short-weighing practice was negligent only and further would state that a "flagrant violation" means nothing more than a violation involv-

ing incorrect weighing practices. Neither position has any standing whatsoever, in that the negligence referred to, wholly in passing and as dictum, was based upon the testimony of Mr. Silver that if his weighmaster was false-weighing livestock, he knew nothing about it. This position was patently ridiculous, in that the weighmaster gave an affadavit that he back-balanced the scales on instructions from Mr. Silver, and the scales were back-balanced so often that the Hearing Examiner felt that Mr. Silver had to know of this practice, even if his weighmaster committed purgery when he advised the U.S.D.A. employees that he did so on instructions of Mr. Silver. In addition, the Department's employees, on at least two occasions, observed the weighmaster taking particular care to back-balance the scales before he began weighing. Further, the remarks of the weighmaster, as to the deliberate back-balancing, was fully corroborated by other evidence, and the record did not demonstrate any purpose or reason for the weighmaster so to weigh livestock absent instructions from his employer. It was, therefore, concluded that the weighmaster "intentionally" under-weighed livestock on instructions from the respondent. It is also worthy of noting in passing a specific finding by the Hearing Examiner at Page 1451 that the respondent "wilfully" and "intentionally" violated—that is weighing falsely and incorrectly, and by reason of the means employed to achieve such results, that is, by knowingly weighing calves when the livestock scale was not in balance. As to the second contention, the Hearing Examiner stated that "Respondent should be suspended as a registrant under the Act for a period of thirty days, which is less than that recommended by complainant,

to achieve some uniformity of sanctions for similar violations of the Act in other cases." (Citing numerous prior decisions) Then follows the misquoted language from the petitioner's footnote which should read "False and incorrect weighing of livestock by registrants under the Act is a flagrant and serious violation thereof."

The Hearing Examiner did not say that every weighing violation was a "flagrant" violation—that is what the Department of Justice is trying to say, ignoring the fact that the same Hearing Examiner cited *Silver*, as authority for invoking suspensions in the three other cases relied upon by the Secretary in the court below, all of which involved deliberate back-balancing.

Discrimination is practically admitted by the government's repeated insistence that cases exist contrary to the position taken by the respondent in the court below, when, in truth and fact, no such cases exist. Since the respondent first alleged arbitrary and discriminatory administration of the Act against it, the Secretary, and now the Department of Justice, have made repeated and pathetic attempts to furnish evidence that suspension orders have been issued against market agencies absent a deliberate, as opposed to an administratively found negligent, short-weighing of livestock. The silence of the Secretary in the briefs below, the failure to furnish an appropriate citation when specifically asked by the panel of judges during oral argument, the wholly immaterial compilation of the Department of Agriculture referred to in the footnote in the petition for certiorari is only compounded by the blatant mis-statement made

at Page 20 of the brief for the petitioners, to the effect that many suspension orders have been entered for short-weighing practices even though the offense was not shown to be deliberate or flagrant, and the cases cited in support thereof.

Eighteen cases are cited for the position that suspension orders had been entered by the Secretary for weight violations, even though that violation was not deliberate or flagrant. It was necessary for respondent's counsel to go to a great deal of time and effort to secure copies of these internal compilations of the United States Department of Agriculture, but such has been done and in all eighteen cases, *without exception*, the market agency involved followed the Department's "Consent Order Procedure" and, in effect, pled guilty. These cases are of no value as a precedent whatsoever. They represent merely sterotyped or identical language in the preliminary statement setting out the fact of an answer, the waiving of oral hearing, and the consent to the issuance of a *specified* order containing findings of fact and conclusions. The introductory paragraph further recites, *without exception*, that the Department has recommended that the order consented to by the respondent be issued. Thereafter follows various findings of fact, all of which conclude with an order that had previously been consented to by the market agency. Insofar as the question before the bar of this honorable court is concerned, these cases represent a sham defense on behalf of the Secretary of Agriculture and are evidence of nothing except that a complaint was filed and the market agency admitted its guilt, knowing in advance what sanctions would be imposed because of the violations alleged.

Even the headnote of each and everyone of these eighteen cases concludes with the same word * * * *consent.* The respondent here denied the allegations brought it by the United States Department of Agriculture and has been fighting to vindicate itself for over three and one-half years. It did not accept the Department's offer of a "Consent Order Procedure," does not admit it violated the Act, and insisted upon its full right of hearing and judicial review. A suspension was invoked as the result of a fact finding by the Department's own employees, which fact finding had for its only basis the Department's own testing procedures and the testimony of its own employees. There was no admission of guilt, and there was no proof of what, if anything, respondent actually did wrong.

A mere cursory examination of the nature of the violations in the eighteen cited cases reveal that the Secretary was magnanimous, indeed, as to some of the sanctions he invoked.

The Solicitor General concludes his footnote as to these cases with the following remark:

> "These cases all involve suspensions under the Packers and Stockyard's Act because the registrant falsely weighed producer's livestock, and in none did the Secretary find that the offender acted deliberately or flagrantly."

Would he lead this honorable court to believe that omitting required information from scale tickets and repeatedly preparing purchase invoices at a weight different from the weight shown on the scale ticket *was not deliberate?* (In re *John A. Seymour*, 28 A.D. 1023 (1969)) Is it not deliberate to refuse to de-

posit sale proceeds in the required "trustee account" on three proven and admitted occasions resulting in a shortage exceeding $50,000.00? (In re *Tony Brazil*, 28 A.D. 869 (1969)) Surely back-balancing the scales and allowing the weighmaster to be a purchaser of livestock he weighs is *deliberate* as well as *flagrant*. (In re *R. J. Trimble*, 29 A.D. 936 (1970)) When scales are found by the Department of Agriculture employees to be back-balanced ten pounds, does it require the use of the exact terms *deliberate* and *flagrant* to make such activities of that nature—See In re *Mary M. Meggs*, 30 A.D. 1314 (1971). Of what assistance to this court, on the issues raised here by the respondent, is the particular choice of adjectives used by the Hearing Examiner in his conclusions, particularly when they all begin with the phrase "by reason of the facts set forth and findings * * * respondents have wilfully violated Sections * * *"?

The Glover Livestock Commission Company, Inc. and, more importantly, this court is entitled to a fair response by or on behalf of the Secretary of Agriculture on this point. If the government is sincere in its position that the scope of review of does not extend to the choice of remedies, without qualifications, and in all cases, regardless of the nature of the violation, the severity of the sanction or the previously established standard by which the imposition of suspensions are to be decided, why does it not go ahead and admit that which has been plain to all who chose to see—that the suspension against the Glover Livestock Commission Company, Inc. was the only one ever ordered in the absence of deliberate and flagrant violations proven either by admission of the market agency involved or by irrefutable evidence of deliberate wrong-

doing? Why take up the time of this court by continuely asserting a fact which is just simply not true?

b. THE PETITIONERS WOULD LEAD THIS HONORABLE COURT TO BELIEVE THAT THE CIRCUIT COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE SECRETARY ON THE QUESTION OF AN ALLOWABLE CHOICE OF REMEDIES.

In a partial quote from the Eighth Circuit's opinion, it is now stated that the court justified the modification on the grounds that "cease-and-desist coupled with damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate". It overlooked the fact that the court went ahead and found that a suspension would be, under the circumstances, "unconscionable".

The government would further limit the court's power to review a sanction in the following excerpt from Page 21 of the government's brief:

> "The court's role is only to determine whether the sanction the Secretary selected is within his authority."

If this be the law, why did the government try to read into the administrative adjudications here a finding of an intentional violation by Glover? Why did they continue to assert that the Secretary had previously made a determination that suspensions were necessary to deter negligent violations, and why did it cite eighteen cases in attempt to support a statement that was not true? If the court had no authority whatsoever, except to determine whether or not the agency acted

within the overall outline of its congressional authority, why was it necessary to cite any previous ruling of the Secretary on weight violation cases?

The quoted language from the government's brief may be what the Department of Justice is seeking on behalf of the Department of Agriculture and all other administrative agencies, but it would require judicial abdication by the courts as to their statutorily authorized supervision over administrative action to achieve that goal:

> "Unless we make the requirements for administrative actions strict and demanding, *expertise*, the strength of modern government can become a monster which rules with no practical limits on its discretion."
>
> "Congress did not proport to transfer its legislative power to the unbounded discretion of the regulatory body." *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, (emphasis the court's)

The Department of Justice contends, and the respondents do not deny, that the public is entitled to be informed of administrative action, and surely the Secretary of Agriculture should be entitled to issue press releases. However, it should be obvious that a press release by the Secretary of Agriculture, the context of the which is that the government of the United States has made a finding that the Glover Livestock Commission Company, Inc. was dishonest in its weighing practices, is certainly more damaging than a twenty-day suspension. Under the "Consent Order Procedure", there is only one press release. If a

market agency fights to vindicate itself against what it considers an unwarranted accusation by the government, there is a press release issued after the Judical Officer issues his order and then one again when the market agency appeals to the circuit court. Further, after the Secretary's investigators, prosecutors, and judges have completed their work and a finding is made as to short-weighing, the press release indicates four violations, whereas there was only the one and the other three are wholly derivitive.

Any news release by the Secretary of Agriculture is going to be considered newsworthy by the press, and the power to gain such attention should not be used indiscriminately. In this light, did the Secretary or the Department of Justice issue such a release when the Eighth Circuit modified the suspension order and found it to be "unconscionable"? Was there a press release issued when the Department of Justice made its decision to seek certiorari?

The respondents have never questioned that the Secretary of Agriculture was granted tremendous powers by Congress, but submits that he should not exercise them without restraint and without fear of any judicial review. The danger of inflicting irreparable damage upon a citizen from even the slightest abuse of those tremendous powers was succinctly stated by the Eighth Cincuit Court of Appeals in *Arkansas Valley Industries v. Freeman*, 415 F. 2nd 718 (1969):

> "It is a serious matter to invest an agency of the government with the power to sit as a prosecutor as well as to sit in judgment on an accused."

C. DIFFICULTY IN ADMINISTERING THE ACT IN QUESTION, FOR WHATEVER REASON, DOES NOT SHIELD THE SECRETARY FROM JUDICIAL REVIEW OF HIS ACTIONS.

The Department of Justice concludes its brief with the following argument:

> "Permitting judicial modification of the administrative sanction would make it more difficult to obtain compliance with the Act."

If it were not so frightening, it would be facetious for the United States Department of Justice to state that judicial review should be denied a wronged citizen because granting of the same would make administration of the Act in question more difficult. Since when did the difficulties of a public servant in performing his assigned tasks become sufficient reason for denying access to the courts to ascertain whether or not he was performing his duties in a discriminatory or non-discriminatory manner.

Further, difficulties in enforcing the Act in question because of a reputedly inadequate appropriation from Congress surely does not form the basis for denying judicial review of that agency's action. The footnote appearing at Page 23 of the petitioner's brief is a paraphrase of certain testimony of an official of the United States Department of Agriculture before a House Sub-Committee on appropriations, and whether the appropriation then existent or now existing is adequate or inadequate would certainly appear to be wholly immaterial when this honorable court considers the constitutional rights of the Glover Live-

stock Commission Company, Inc. If the Department requires a larger appropriation from Congress, let it go back to Congress from whence it got its authority to act in these areas and not to the courts, whose duty it is to uphold the constitutional rights of those affected by the agency's actions.

The government talks about the *threat* of sanction, such as a suspension, as a determent to violations of the Act. What is morally right or proper or, more importantly, constitutional about a governmental administrative agency desiring to threaten a registrant with a suspension and yet desiring to be secure in the knowledge that it is immune from judicial modification or elimination of the sanction, if imposed? Judicial review might make it more difficult for the Secretary of Agriculture or the head of any other administrative agency to obtain compliance with the Act, but administrative inefficiency might do likewise.

Finally, it is not the United States Department of Agriculture or the other administrative agencies that need protection by this court * * * it is those like the Glover Livestock Commission Company, Inc. who need a federal registration to remain in business who need such protection. A reversal as to Glover's partial vindication below would not seem likely to invite deliberate, intentional, and flagrant violations of the provisions of any regulatory statute, but a reversal could very likely force otherwise innocent persons or organizations similarly situated to accept an agency's offer of a "Consent Order Procedure", simply because they had lost confidence that the courts would give them any relief, regardless of the merits of their position.

The ruling of the Eighth Circuit Court of Appeals in the case of Glover Livestock Commission Company, Inc. poses no great threat to the administration of the Act in issue by the Secretary. The opinion buttresses his strength and power to have his own employees investigate, prosecute and judge anyone who needs a registration under the Act. All the Eighth Circuit said was that the sanctions he imposes, through the activities of his investigators, prosecutors, and judges must not be "unconscionable". What possible objection could men of reason have to such a mild qualification on administrative authority?

CONCLUSION

For all the reasons set out herein, it is submitted that the judgment of the court of appeals should be affirmed and for the further and more compelling reason that a reversal would be tantamount to a denial of any judicial review of an administrative agency's actions under any circumstances.

Respectfully Submitted,

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